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IN THE

Supreme Court of the United States

October Term, 1935

UNITED STATES OF AMERICA, *Petitioner* v. BANK OF NEW YORK TRUST COMPANY	No. 195
UNITED STATES OF AMERICA, *Petitioner* v. PRESIDENT AND DIRECTORS OF THE MANHATTAN COMPANY, Successor to the BANK OF MANHATTAN TRUST COMPANY	No. 196
UNITED STATES OF AMERICA, *Petitioner* v. LOUIS H. PINK, Superintendent of Insurance of the State of New York, Liquidator of the Domesticated United States Branch of the First Russian Insurance Company, Established in 1827	No. 197

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF SAMSON SELIG, AS *AMICUS CURIAE*

SAMSON SELIG
Amicus Curiæ

SAMSON SELIG
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ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF SAMSON SELIG, AS *AMICUS CURIAE*

Statement

This brief is filed by Samson Selig, as *Amicus Curiae*, pursuant to the written consent of all counsel, heretofore filed with the Clerk of this Court.

Submission of Brief

In the petition of the United States of America against the Bank of New York and Trust Company, this brief is submitted on behalf of stockholders of the Moscow Fire Insurance Company, one of whom is a resident of Canada, another is a resident of England, and also on behalf of the Deutsche Bank, a German bank, having a lien on certain stock of the Moscow Fire Insurance Company.

In the petition of the United States of America against the President and Directors of the Manhattan Company, successor to the Bank of Manhattan Trust Company, this brief is submitted on behalf of two creditors of the Northern Insurance Company of Moscow. One of said creditors, the Assurance Compagniet Baltica, Aktieselskab (The Insurance Company Baltica, Ltd.), is a resident of Copenhagen, Denmark, and its claim is based on reinsurance treaties with the Northern Insurance Company of Moscow executed in Copenhagen, Denmark, and in Moscow, Russia. The other of said creditors is J. Frank & Co., an unincorporated German company, whose claim is based on policies of cargo insurance, the loss on which was determined by a Prize Court in England.

In the petition of the United States of America against Louis H. Pink, Superintendent of Insurance of the State

of New York, Liquidator of the Domesticated United States Branch of the First Russian Insurance Company, Established in 1827, this brief is submitted on behalf of more than 400 policyholders of the First Russian Insurance Company, none of whom is a resident of the Union of Soviet Socialist Republics.

Nature of the Action and Facts

The facts in these three cases have been set out in great detail in the briefs in chief submitted by the petitioner and the respective respondents. Any repetition of them here would be unnecessary duplication.

Summary of the Argument

I. Confiscation and Public Policy. Petitioner's claim rests on Soviet decrees. Foreign decrees are given effect here only by comity. These decrees, being confiscatory, are violative of our public policy and will not be given effect by our courts. The exact point has been decided by the New York Court of Appeals, which has jurisdiction of the funds.

II. The Litvinoff Assignment. The funds in question are not within the Litvinoff assignment, because

(a) Respondents are not American nationals who owe anything to the Russian Government within the meaning of the assignment.

(b) The assignment covers sums due the Soviet Government as successor of prior Governments of

Russia or otherwise. The expression "due to the Soviet Government as the successor to the prior governments of Russia or otherwise" was not intended to cover the funds in question.

(1) The law and the facts surrounding the transaction negative any such intention in the assignment.

(2) The second part of the assignment also negatives such intention.

(3) Under the rules of construction of diplomatic instruments the assignment cannot be construed as petitioner contends.

(4) Petitioner's construction would be contrary to the attitude heretofore taken by the petitioner to protect American claims against the Soviet Government.

III. Jurisdiction. The Supreme Court of the State of New York having acquired jurisdiction over the funds in question, the District Court is without power to interfere with or enjoin the pertinent proceedings therein.

POINT I

The Soviet decree relied upon by the petitioner to pass title to the funds in question has no extra-territorial effect, and, being contrary to our public policy, will not be enforced in our courts.

Baglin v. *Cusenier*, 221 U. S. 580;
James & Co. v. *Russia Insurance Co.*, 247 N. Y. 262;

Petrogradsky M. K. Bank v. *National City Bank,* 253 N. Y. 23;
Matter of People (*Russian Re-Insurance Co.*), 255 N. Y. 415;
Russian Re-Insurance Co. v. *Stoddard,* 240 N. Y. 149;
Sokoloff v. *National City Bank,* 239 N. Y. 158;
James & Co. v. *Second Russian Insurance Co.,* 239 N. Y. 248;
Huntington v. *Attrill,* 146 U. S. 657;
McDonald v. *Mabie,* 243 U. S. 90.

It is well settled that the laws of one country are not enforced in another country as a matter of right, but only under principles of comity. *Bank of Augusta* v. *Earle,* 13 Pet. 519, 598; *Second Russian Ins. Co.* v. *Miller,* 297 Fed. 404, 408, affirmed 268 U. S. 552; *The Apollon,* 9 Wheat. 362; *Hilton* v. *Guyot,* 159 U. S. 113, 163-164, where the Court said:

> "No law has any effect of its own force beyond the limits of the sovereignty from which its authority is derived. The extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judicial decree shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call 'the comity of nations.'"

When, however, a foreign law sought to be enforced here offends our public policy, comity gives way to our public policy and the foreign law will not be enforced by our courts. *Huntington* v. *Attrill,* 146 U. S. 657, 675, where the Court said:

> *"If the foreign law is a penal statute, or if it offends our own policy, or is repugnant to justice or to good morals, * * * we are at liberty to decline jurisdiction."*

In *Vladikavkazsky Ry. Co.* v. *N. Y. Trust Co.*, 263 N. Y. 369, the Court of Appeals, by HUBBS, *J.*, stated at page 378:

> "The principle which determines whether we shall give effect to foreign legislation is that of public policy. * * * Where there is confliction between our public policy and comity, our own sense of justice and equity as embodied in our public policy must prevail."

The Russian decrees relied upon by the Government here are decrees of confiscation.* They offend our public policy and, accordingly, our courts will not enforce them under principles of comity or otherwise. They have no extra-territorial effect, nor does the fact that recognition is retroactive give them any validity outside of Soviet Russia.

These principles have been fully covered in the briefs submitted on behalf of the respondents, Bank of New York & Trust Company, Bank of the Manhattan Company, Louis Pink, as Superintendent of Insurance, and the other briefs submitted *amici curiae*. It would be duplication to go fully into the subject and authorities again.

To the universal holdings denying extra-territorial effect to confiscatory foreign legislation the petitioner re-

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* Petitioner's brief euphemistically states the decrees "appropriated" "took over" (pp. 22, 27, 57), and studiously avoids "confiscated," but the complaints frankly say the decree "confiscated and appropriated," etc. (*Bank of New York & Trust Co.*, R. 3; *Manhattan Co.*, R. 3; *Pink*, R. 4).

plies by citing cases dealing with the transfer of ownership of the property of an insolvent foreign corporation in liquidation.

We have no quarrel with such authorities, but from these cases dealing with orderly liquidation of insolvent corporations it is a far cry to hold that it is in accordance with public policy for a state to "confiscate and appropriate" (to use the language of the bills of complaint herein) all of the assets of a financially solvent and going insurance company without a thought of its creditors, its policyholders or its obligations of any kind. The petitioner has not cited and we challenge it to cite a single case where such confiscatory action has been held to be within our public policy, or has been given effect by our courts as to property located here.

In its argument, however, petitioner points out that the Soviet decree of December 1, 1918 provides that a commission shall be established to "liquidate" the insurance companies whose assets were appropriated, and suggests that the Soviet Liquidating Commission acquired a title to assets wherever located that must be recognized in our courts.

Petitioner's contention was rejected by the District Court in the following language:

> "The difficulty with this contention is that the complaints allege specifically that the properties of the two companies were 'confiscated and appropriated' by the Soviet Government. However it is perfectly clear that the liquidation of a corporation implies winding up and distribution of the assets among creditors and stockholders (*Lafayette Trust Co.* v. *Boggs,* 213 N. Y. 260, 263; *Matter of Silkman,* 121 A. D. 202)" (*Bank of New York & Trust Co.,* R. 81-82).

The ruling of the District Court finds abundant support in judicial opinion on the quality of the Soviet "liquidation." The New York Court of Appeals, in *Sliosberg* v. *New York Life Ins. Co.*, 244 N. Y. 482, 491, had under consideration the December 1, 1918 decree and the events that followed it. It found not liquidation, but sheer confiscation. And as to these very Russian insurance companies whose assets are now claimed by the petitioner, the same Court has recognized it as self-evident that there was no liquidation in Russia,—"there is no receiver at the domicile" (*Matter of People* [*First Russian Ins. Co.*], 255 N. Y. 415, 424), "here of course there is no home liquidator" (*Matter of People* [*Second Russian Ins. Co.*], 244 N. Y. 606, 607). Lord Romer, speaking for the English Court of the Soviet's "liquidation" of the First Russian Company, has said:

> "The business of the liquidators was merely to collect what assets remained and hand them over to the state. For it seems quite clear that they were never intended to pay any of the plaintiff's company's liabilities" (*First Russian Ins. Co.* v. *London & Lancashire Ins. Co.*, L. R. [1928], 1 Ch. 922, 953).

There was then no liquidation in Russia. The claim of title through a Russian "liquidator," asserted by the petitioner, is a claim based on sheer confiscation. Our courts are not required to recognize, and will not recognize, such a claim.

The petitioner's error is in the premise that the Soviet Government could obtain the fund in New York. Upon the exact point—whether or not the Soviet Government, as a result of its confiscations, can obtain title to property

having a *situs* outside Russia—the courts of several nations have spoken. So far as we know, in every jurisdiction where the point has arisen, the courts have rejected the contention that the Soviet could by virtue of its confiscations obtain title to assets situated outside its own jurisdiction.

ENGLAND: *The Jupiter* (1927), p. 122, aff'd (1927), P. 250 (Ct. App.),

where Lord Justice BANKS said:

> "The decree had no operation to transfer any property except property within the jurisdiction of the Soviet Republic."

FRANCE: *Etat Russe* v. *Ropit* (1925), 52 Clunet 391 (Trib. Comm. Marseille); (1926) 53 Clunet 667 (Cour d'Appel) (translation in Hudson, Cases on International Law [1929] 137); (1928) 55 Clunet 674 (Cour de Cassation);

GERMANY: *Ginsberg* v. *Deutsche Bank* (1928), Juristiche Wochenschrift 1232, 1233 (Kammergericht, Berlin);

DENMARK: *Council of Russian Orthodox Community in Copenhagen* v. *Legation of R. F. S. F. R.* (1925-26), Ann. Dig. of Int. L. Cases 24 (Sup. Ct. of Denmark);

SWITZERLAND: *Wilbuschewitz* v. *Zurich* (1926), 53 Clunet 1110, 1113 (Trib. Fed.), (1925-26) Ann. Dig. of Int. L. Cases 96.

The foregoing pronouncements by the courts of foreign nations were made in each instance—with the excep-

tion of Switzerland—after the recognition of the Soviet Government by the respective foreign offices.

We need not, however, rely upon foreign decisions.

To the court of last resort of the State of New York the issue of the effect of Soviet decrees upon property situate in New York has been presented since the recognition of the Soviet Government by the United States. The decision was explicit. The New York Court of Appeals declared that these decrees of confiscation are repugnant to "our sense of justice and equity." "That the confiscation decree in question, clearly contrary to our public policy, was enacted by a government recognized by us, affords no controlling reason why it should be enforced in our courts" (*Vladikavkazsky Railway Co.* v. *New York Trust Co.*, 263 N. Y. 365, citing *Baglin* v. *Cusenier*, 221 U. S. 580).*

The unsuccessful appellant moved for reargument of the *Vladikavkazsky* decision. *It cited to the Court of Appeals the Litvinoff letter of November 16, 1933. It contended that the assignment to the United States subjected it—a debtor bank holding on deposit funds of a nationalized Russian corporation—to suit by the United States. The Court of Appeals denied reargument* (264 N. Y. 595).

The decision thus made with precise relation to the Soviet Government follows decisions of this Court involving other recognized governments.

Baglin v. *Cusenier*, 221 U. S. 580;
Second Russian Ins. Co. v. *Miller*, 268 U. S. 552.

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* In *Dougherty* v. *Equitable Life Ins. Co.*, 266 N. Y. 71, the Court recognized the authority of the *Vladikavkazsky* case as unimpaired. It directly based its decision that decrees of confiscation afforded a defense upon its view that the insurance policies there in suit specifically provided for construction according to Russian law.

In the *Vladikavkazsky* case the New York Court of Appeals only followed what it had repeatedly said before. As for example in *James & Co.* v. *Second Russian Ins. Co.*, 239 N. Y. 248.

In the *James* case the New York Court of Appeals, referring to the same confiscatory legislation of the Soviet upon which the present action is predicated, said:

> "As to the Soviet decree, we think its attempted extinguishment of liabilities is *brutum fulmen*, in England as well as here, and this whether the government attempting it has been recognized or not. Russia might terminate the liability of Russian corporations in Russian courts or under Russian law. Its fiat to that effect could not constrain the courts of other sovereignties, if assets of the debtor were available for seizure in the jurisdiction of the forum. (*Barth* v. *Backus*, 140 N. Y. 230; *Matter of People* [*City Equitable Fire Ins. Co.*], 238 N. Y. 147, 152; cf. *Matter of Barnett's Trusts*, 1902, 1 Ch. 847). The decree invoked by the defendant is not in any true sense a decree of bankruptcy, though even if it were, there would be limits to its extraterritorial validity. A decree of bankruptcy presupposes a distribution of the assets for the benefit of creditors, and this decree is one of confiscation, appropriating the assets for the benefit of the Soviet republic. One government does not execute the tax laws of another (*State of Colorado* v. *Harbeck*, 232 N. Y. 71, 82), nor help another enforcing a penalty or forfeiture (*Loucks* v. *Standard Oil Co.*, 224 N. Y. 99, 102)" (239 N. Y., at p. 257).

"Neither comity nor public policy," wrote Judge Cardozo in the *James* case, "requires us to enforce a man-

date of confiscation at the behest of such a government to the prejudice either of our own citizens or of those of any friendly power seeking justice in our courts" (239 N. Y., at p. 257).

In view of these pronouncements it would not appear likely that were the Soviet Government itself the plaintiff it could annul the settled judgments of the Court of Appeals directing payment of these very funds and recover them for itself in actions predicated solely on its confiscation decrees. Nor is its assignee, the petitioner here, in any better case. Neither can recover on a cause of action predicated on a violation of public policy.

Public policy is not the pliable concept that petitioner's counsel would have it. Public policy does, within limits, change with the times; but certain fundamentals of national policy survive all changes short of social revolution. These fundamentals "establish a standard for our Government which the Constitution does not make dependent upon the standards of other governments" (compare *Russian Volunteer Fleet* v. *United States,* 282 U. S. 481, 492). The confiscation of property without compensation remains repugnant to our scheme of things. The fiat of an executive officer cannot unsettle premises imbedded in our social order. It remains with the *courts* to determine public policy. Petitioner would have us believe that the whole question is merely one of foreign relations.

Only confusion is wrought by thinking of the problem as one in foreign relations. The question of *recognition* of Russia is, of course, a matter both federal and executive. The disposition of private rights within the jurisdiction of a court of New York is a matter *neither federal nor executive.*

POINT II

The funds in question are not within the Litvinoff assignment.

A. The respondents are not American nationals who owe anything to the Russian Government within the meaning of the assignment.

The corporations from whom these funds are derived are not American nationals. Obviously they are Russian corporations and have been judicially so declared. *Matter of People re Moscow Fire Insurance Company*, 255 N. Y. 433; *Matter of People re First Rusisan Insurance Company*, 255 N. Y. 428. They still have juristic standing in our courts:

Petrogradsky M. K. Bank v. *National City Bank*, 253 N. Y. 23, 29;
Matter of People (*Russian Reinsurance Co.*), 255 N. Y. 415, 425;
Vladikavkazsky Ry. Co. v. *N. Y. Trust Co.*, 263 N. Y. 369.

The assignment however, limits the source of collection to amounts due from a particular class of debtors, to wit: American nationals.

Of course, the respondents are American nationals. Equally, of course, nobody can seriously contend that the "American nationals" who owe debts to the Russian Government, mentioned in Mr. Litvinoff's letter, can pos-

sibly include American banking corporations and municipal officers merely acting as depositary and disbursing agents of money judicially declared to belong to a Russian corporation.

For example, respondent Bank of New York Trust Company here is holding these moneys by virtue of the decision of the Court of Appeals, *People re Moscow Fire Insurance Company,* 255 N. Y. 433, where the Court said at page 435, in speaking of the release of the Moscow funds by the Superintendent of Insurance:

> "Delivery may be made to a trust company in the city of New York as agent or depositary upon the stipulation of the insurance company and its conservators that the funds will not be withdrawn except upon the order of a court of competent jurisdiction."

Defendant is that trust company, acting here only as agent or depositary. It is fantastic to contend that it is one of the "American nationals" from whom "an amount is admitted to be due or may be found to be due to the Government of Russia." That these funds have been deposited with the defendant as agent or depositary and by an order of the court can hardly change the status of the debt into one due and owing from an "American national."

Unquestionably, Mr. Litvinoff referred to such American nationals as the defendant in *State of Russia* v. *National City Bank,* 69 Fed. (2nd) 44, where an American Bank has always been the debtor to the Russian Government for the latter's funds actually deposited with it.

The respondent Bank of New York & Trust Company, in so far as these funds are concerned, *owes* no money

to any one, least of all to the Soviet government. If and when it is ordered to do so by a court of competent jurisdiction, it will pay out these funds to whomsoever the court finds is owed money by the *Moscow* company. It is this company, and not the respondent, which is at all times the debtor.

In contemplation of law, there is no *debt* due from this defendant to the Soviet Government. A debt is a sum of money due upon contract, express or implied.

> *Hampton* v. *Truckee Canal Co.*, 19 Fed. 1, 4;
> *Guaranty Trust Co.* v. *Galveston City R. Co.*, 107 Fed. 311, 317;
> *Leggett* v. *Bank of Sing Sing*, 24 N. Y. 283, 290.

In American and English Encyc. of Law (2nd Ed.), it is stated in Vol. 8, page 986:

> "The legal acceptance of 'debt' is a sum of money due by certain and express agreement."
> "A debtor is one who owes a debt; he who may be constrained to pay what he owes."

If the funds in question be regarded as being held in escrow, then no title to them would pass until the condition of the escrow should be performed (*Stanton* v. *Miller*, 58 N. Y. 192, 201). Indeed when these funds were deposited it was not known to whom they would become payable (*Bushnell* v. *Chautauqua County Nat. Bank*, 74 N. Y. 290). It was not the ordinary debtor-creditor relationship existing between a bank and a depositor, where the depositor can draw out money at will. As already stated, these funds could not be withdrawn by any one except upon an order of the court. Until such an order be entered, it cannot be said that there is a debt due from the respondent.

Of course the same argument applies to the respondent Bank of Manhattan and the respondent Superintendent of Insurance. Both are holding funds judicially declared to belong to a Russian national pending court order for their disposition. Even had the petitioner and the Soviets meant to seize such funds from those who the courts had said were entitled to them, can it be doubted that the assignment would have been specific on the subject? The assignment says "due * * * from American nationals, including corporations, companies, partnerships or associations." If respondents were meant to be included would not the assignment have further said "whether directly the debtors, or holding the funds as depositary, disbursing agent, or in any other capacity," or some other simple and appropriate language?

B. The Assignment covers sums due the Soviet Government as successor of prior Governments of Russia or otherwise. The expression "due to the Soviet Government as the successor to the prior Governments of Russia or otherwise" was not intended to cover the funds in question.

(1) The law and facts surrounding the transaction negative any intention to include in the assignment the funds in suit.

At this point it becomes necessary to consider the exact language embodied in the Litvinoff letter of November 16th, 1933, which contains the assignment. This letter was written at the same time that a number of other letters, all bearing the same date, were written by Mr. Litvinoff at the time of the recognition of Russia, each one bearing on a different phase of the recognition negotia-

tions, such as religious liberty, abstention from propaganda, etc., etc. They all appeared in the public press at the time of recognition and have since then been published in the American Journal of International Law, volume 28, January, 1934, pages 1, etc., of supplement.

The letter with which we are concerned appears at page 21 of the record of the Bank of New York, and at page 27 of the record of Pink.

The parts of Mr. Litvinoff's letter relative to the assignment, read as follows:

> "The Government of Union of Soviet Socialist Republics will not * * * initiate any new litigations for the amounts admitted to be due or that may be found to be due it, as the successor of prior Governments of Russia, or otherwise, from American nationals * * * and also the claim against the United States of the Russian Volunteer Fleet * * * and does hereby release and assign all such amounts to the Government of the United States, the Government of the Union of the Soviet Socialist Republics to be duly notified in each case of any amount realized by the Government of the United States from such release and assignment."

The assignment itself purports to assign amounts which come to the Soviet Government as the successor of prior Russian Governments. It does not in terms purport to convey to the United States the assets situated here of the Moscow Insurance Company, the Northern of Moscow Insurance Company or the First Russian Insurance Company, or indeed of any other nationalized Russian corporation. The petitioner claims that that effect is to be found in the words "or otherwise" following the phrase "as successor of prior Governments."

It would seem strange that if the intent had been present to assign the assets of these corporations, that the assignment should not have said so, either by mentioning the corporations by name or by using some appropriate language. The omission to do so is the more remarkable when we consider the view of nationalization taken by the courts at the time.

Let us see what the situation was at the time that the assignment was handed to the President of the United States by Mr. Litvinoff. At that time the courts of every country in which the question had arisen had held that the Soviet decrees of nationalization could not operate to transfer title to the Soviet Government of property located outside the confines of Soviet Russia (*supra*, pp. 9 and 10). These decrees had been described by our courts as "brutum fulmen" (*James* v. *Russian Insurance Co.*, 239 N. Y. 248).

*The Soviet Government itself had declared by official document on more than one occasion that these confiscatory decrees had no extra-territorial effect.**

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* Some of these Soviet documents are to be found in the record, President and Directors of the Manhattan Company, pages 39, 40, 41, 42. In the Circular issued by the Soviet Commissariat of Justice, it is stated:

> "Proprietary rights of citizens of the R. S. F. S. R. enforcible outside the R. S. F. S. R. are governed by the laws of the country where they are to be enforced (*Manhattan Company*, R., p. 39)."

and in the Circular issued by the Soviet People's Commissariat for Foreign Affairs, No. 42, it is stated:

> "The Law on Property established by the decrees of the Russian Soviet Government does, therefore, determine only legal relations pertaining to property rights as arise on the territory of the R. S. F. S. R. Legal relations pertaining to property rights whereof the subject-matter is situated outside the territory of the R. S. F. S. R. and is not connected with such territory cannot be governed outside the territory of the R. S. F. S. R. by Russian Law and are—irrespective of the nationality of the persons entitled to such rights, be they even Russian Citizens—subject to the effects of local Law."

The petitioner in a footnote in its brief, page 34, states that these circulars were passed on in *Perry* v. *Equitable Life Assurance Co.*, 45 T. L. R.

Under these circumstances is it conceivable that if in the minds of the contracting parties there had been an intent to include in the assignment as Russian Government assets the local assets of Russian private corporations, that the parties would not have unmistakably said so? Would not the assignment have read that the Soviet Government assigned and released "all amounts found to be due it as the successor of prior Governments of Russia or *by nationalization, confiscation, appropriation* or otherwise," or similar words of unmistakable intent? Is it possible that the intent to acquire title by means which our courts had repeatedly declared could not prevail would be left to inference? Is it possible that had there been an intent in the minds of the contracting parties to convey confiscated assets, something new and abhorrent to our whole scheme of life, that the contracting parties

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468, wherein it was held that they did not constitute binding declarations of Russian law and did not restrict the application of the decrees.

These circulars were, however, construed as Russian law by HILL, *J.*, in "The Jupiter," P. (1927) 120, at 144. Affirmed, Court of Appeal, P. (1927) 250. Moreover, in the latest declaration of the British courts on the subject, decided long after the *Perry* case, *In re Russian Bank for Foreign Trade*, Chancery Decisions, 1933, page 745, MAUGHAM, *J.*, at page 759 states:

> "As will be seen later, the Soviet Government does not itself assert that the nationalization decrees have an extra-territorial effect."

and then goes on to say at page 767:

> "The decrees in question could not according to our laws have the effect of extinguishing the debt, if locally situate here, or of transferring it to the Soviet Republic. This follows, I think from the decisions of Hill J. and the Court of Appeal in The Jupiter. It is interesting to note that the same view is taken by the R. S. F. S. R. itself in a circular dated April 12, 1922, and in a circular issued by the People's Commissariat of Justice to all District Courts dated September 26, 1923, which are set out in the elaborate judgment of Hill J. above referred to. These circulars show that the Soviet Government does not regard the nationalizing decrees as having any extra-territorial effect even as against Russian citizens."

would not have said so in the most specific language? Would they have left such a meaning to be inferred from so vague and general an expression as "or otherwise"?

What were the assets which obviously the Soviet Government meant to convey to the United States? The former Russian Imperial Government and the Kerensky Governments had various and substantial sums of money deposited in American banks wherein the American banks were the *direct* debtors of the former Russian Government.

For example:

> Several million dollars in the National City Bank as to which a suit was then pending in the United States District Court for the Southern District of New York, entitled "State of Russia *v.* Bankers Trust Company and National City Bank, defendants" (69 Fed. (2d) 44).
>
> Again, there was a claim for $4,976,722.78, with interest, being monies deposited by the former Russian Government with the Guaranty Trust Company of New York (*Bank of New York,* R. 19).
>
> There was also a claim for $15,000.00 against the Guaranty Trust Company of New York arising out of a contract between the Russian Government and the Morton Truck & Tractor Co. (*Bank of New York,* R. 19);
>
> There was also a claim for $11,680.00 against the New York Trust Company on Account of monies alleged to have been deposited by the Russian Financial Attache on or about September 10, 1918, to cover interest on the bonds of the Vladikavkazsky Railroad Company, which interest had been guaranteed by the former Imperial Russian Government (*Bank of New York,* R. 19);

There was also a claim of the Russian Government for approximately $1,050,000 against the Curtiss Aeroplane and Motor Company (*Bank of New York,* R. 19);

There was also a claim for approximately $384,-118.07 with interest, for monies due from the Canadian Pacific Railways Company under contracts with the Russian Government (*Bank of New York,* R. 19);

There was also a claim for approximately $1,412,532.35 with interest on account of the amounts due from the United States Shipping Board for the requisition of Hulls Nos. 6 and 7 of the Russian Volunteer Fleet; a claim for approximately $218,750 originally deposited with the Guaranty Trust Company as escrow money on Hull No. 6 under contract for the purchase of the said hull by the Russian Volunteer Fleet; a claim for the sum of approximately $23,643.75 on account of balance due from the United States Shipping Board in connection with the charter of certain steamers of the said Russian Volunteer Fleet (*Bank of New York,* R. 19).

These were the type of claims which it was intended to assign to the United States for collection by it. These were all Russian Government monies. Some of them stood directly in the name of the Russian Government. Others the Soviet Government claimed "otherwise." For example, the $11,680 held by the New York Trust Company on account of payments made by the Russian Financial Attache in connection with interest on a bond issue of the Vladikavkazsky Railway Company. These monies

did not stand in the name of the Russian Government, but had for various reasons been credited to the Vladikavkazsky Railway Company, but inasmuch as the payments had been actually made by the former Russian Government, the Soviet Government might make claim thereto.

That was the kind of a claim which was intended to be covered by the words "or otherwise," and if monies such as are involved in these suits are intended to be included, it is unbelievable that the draftsman of the Litvinoff assignment would not have so stated. Why should the draftsman of the assignment be careful to include and specify by name the amounts due in connection with the Russian Volunteer Fleet claim, but not think it necessary to specify equally great amounts which were the property of the Moscow Fire Insurance Company and of the First Russian Insurance Company?

Besides the amounts which might be considered to come under the "or otherwise" phrase, as described above, there was another class of amounts which might have been included in that phrase.

It must be recalled that after the downfall of the Kerensky Government, before the Soviets consolidated their position and brought under their control the territory which they have since dominated, there was a period during which various local and independent governments were set up, such as the Omsk All Russian Government, as to which the Court of Appeals said:

> "It is a matter of common knowledge and the moving papers establish the fact that if the Omsk All Russian Government was at any time even a *de facto* government in the international sense, it was created as such with Admiral Kolchak at its head at Omsk in November, 1918, and recognized by General Seminoff and his force at Vladivostok,

and thereafter driven out of all regional control by the Bolshevik government, not later than March, 1920.

"During its ephemeral and disastrous career, it asserted its authority over a portion of the inhabitants of the former Russian Empire who had, after the debacle, separated themselves from the central government and established an independent sovereign government over a limited territory in Siberian Russia. It was not a subordinate state nor a civil division of the Soviet Republic." (*Nankivel* v. *Omsk All Russian Government*, 237 N. Y. 150, at 156.)

Of course, the Soviets would not want to recognize such pretended governments as these in the sense in which they were willing to acknowledge the Imperial and Kerensky Governments, as "prior" governments. Yet they would not be content to waive claim to any assets the pretended governments might have here. It was probably also to cover such claims without acknowledging these sporadic "governments" as "prior" governments, that the words "or otherwise" were inserted in the assignment. Nationalization of private corporations was never meant to be included thereby.

(2) The second half of Mr. Litvinoff's letter negatives the Petitioner's contention.

The latter half of Mr. Litvinoff's letter reads:

"The Government of the Union of Soviet Socialist Republics further agrees, preparatory to the settlement referred to above, not to make any claim with respect to:

"(a) judgments rendered or that may be rendered by American courts insofar as they relate to property, or rights, or interests therein, in which the Union of Soviet Socialist Republics or its na-

tionals may have had or may claim to have an interest; or,

"(b) acts done or settlements made by or with the Government of the United States, or public officials in the United States, or its nationals, relating to property, credits or obligations of any Government of Russia or nationals thereof."

This is an unusual undertaking. What could have been its purpose? To one familiar with the situation of Russian litigation at the time it is entirely clear. Let us see what had been taking place during the years elapsed since the formation of the Soviet Government. In these years there had been conducted a vast mass of litigation arising out of the confiscatory decrees which, it is submitted, are unprecedented in the world's history. In every country it had become necessary to bring litigation to test the effect of the Soviet decrees to see how far they affected the rights of creditors, shareholders and others interested in Russian corporations. Most of the American litigation had taken place in New York where the bulk of the Russian corporate assets were situated. The Court of Appeals of the State of New York had repeatedly passed on various phases of the Russian situation. Some of these cases which may give a picture of the involved legal situation and type of questions dealt with may be found in the following:

Sokoloff v. *National City Bank*, 239 N. Y. 158;
Petrogradsky M. K. Bank v. *National City Bank*, 253 N. Y. 23;
Severnoe Securities v. *Westminster Bank*, 214 App. Div. 14;
Lewine v. *National City Bank*, 248 N. Y. 365, rearg. gr. 248 N. Y. 656, aff'd 249 N. Y. 528;

Friede v. *National City Bank*, 250 N. Y. 288;
McCarthy v. *Culkin*, 254 N. Y. 328;
Sliosberg v. *New York Life Ins. Co.*, 244 N. Y. 482;
Severnoe Sec. Corp. v. *London & Lancashire Ins. Co.*, 255 N. Y. 120.

Liquidation proceedings had been brought in the case of nearly every Russian Insurance Company which had a branch and property in New York, and these litigations, after an enormous amount of effort, had been taken to the Court of Appeals and decisions had been obtained from that tribunal.

Andre v. *Beha*, 211 App. Div. 380, 240 N. Y. 605;
First Russian Insurance Co. v. *Beha*, 240 N. Y. 601;
Russian Reinsurance Co. v. *Stoddard*, 240 N. Y. 149;
Matter of People, Russian Reinsurance Co., 255 N. Y. 415, 423;
Matter of People, Northern Insurance Company, 255 N. Y. 433;
Matter of People, Second Russian Insurance Co., 255 N. Y. 437;
Matter of People, First Russian Insurance Co., 255 N. Y. 440.

Certain principles as to the liquidation of Russian corporations and the rights of creditors, shareholders and directors had been fixed.

The Court of Appeals, in the cases of the several Russian insurance companies had issued decrees instructing the Superintendent of Insurance and the various litigants before it as to what should be done.

Hundreds of actions were pending against the First Russian Insurance Company, the Second Russian Insurance Company and other insurance companies and banks.

Undoubtedly it was intended by the contracting parties that all of this litigation and effort should not be further confused and perhaps go for naught by reason of the injection into the situation of any question as to the retroactive effect of recognition of the Soviet Government. In other words, it was to avoid precisely the contention which the petitioner now makes, that the second half of Mr. Litvinoff's letter was drawn up.

If it had been intended that the Soviet Government was to assign to the United States in the first paragraphs of Mr. Litvinoff's letter, not only the moneys standing to the credit of the Russian Government as such, but also the moneys belonging to Russian corporations or nationals here, there would be no sense in the Soviet Government agreeing, in the last paragraphs, "not to make any claim with regard to property or rights which the Soviet nationals had or may claim to have" because the Soviet Government would already have made an assignment of such property and rights to the United States and it could make no further claim to them.

Viewed in the light of the law and facts, existing at the time of recognition, Mr. Litvinoff's letter is clear.

In the first part he assigned Russian Government claims, whether standing in the name of a prior government, of one of its attaches, or of a pretended government.

In the last half he covenanted that the Soviets would not attempt to use recognition to inject themselves and their laws into the litigation pending and to be brought

over rights and properties of Russian nationals situate here. Or put another way, that the retroactive effect of recognition would not be advanced to disturb rights and principles involved in disposition of Russian private property situated here. As is said by Mr. Hartwell Cabell in his brief for Assecuranz Union, Intervenor herein, at page 17:

> "The Soviet Government has ratified and legalized the disposition of these funds by the Courts of this Country."

Such also is the disinterested opinion of students of international law. The editor of the American Journal of International Law,* January, 1934, speaking of the last part of Mr. Litvinoff's letter, said:

> "This last stipulation is apparently intended to obviate legal difficulties which might otherwise arise on account of the retroactivity of recognition which in law relates back to the date of the origin of the recognized government, thus legalizing all intermediate acts of that government."

In *State of Russia* v. *National City Bank*, 69 Fed. (2nd) 44, the Court in speaking of the assignment, said:

> "Moreover, it is apparent that the intent was to assign all the claims of the Soviet Government to the United States, and it agreed to leave undisturbed diplomatically final non-appealable judgments and decrees of the American courts touching Russian affairs and non-judicial acts done in good faith by and with the officials of the previously recognized government of Russia, or its nationals, relating to property, credits or obligations of any Government of Russia or nationals thereof."

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* Mr. Chandler P. Anderson, at present American Commissioner on the Mixed Claims Commission, United States and Germany.

(3) Under the rules of construction of diplomatic instruments the assignment cannot be construed as petitioner contends.

The construction of the Litvinoff assignment urged by petitioner would mean the destruction of the rights of creditors and shareholders of the nationalized corporations in their property here and would injure in this way not only Russians but other friendly aliens and American citizens who have claims and judgments against those corporations, and no other source of collection.

It is a fundamental principle of law that, in the case of diplomatic assignments between nations, private property of nationals of the assignor government always will be recognized and protected (*U. S.* v. *Percheman,* 7 Pet. 51, 87; *Strother* v. *Lucas,* 12 Pet. 410, 438; *Coffee* v. *Grooves,* 123 U. S. 1, 9; *Kinkead* v. *U. S.,* 150 U. S. 483).

When treaties are negotiated between nations, private rights remain the same as before (*Chicago, R. I. & P. Ry. Co.* v. *McGlinn,* 114 U. S. 542, 546; *Vilas* v. *City of Manila,* 220 U. S. 345). Treaties are to be interpreted upon the principles which govern the interpretation of contracts in writing between individuals (*Sullivan* v. *Kidd,* 254 U. S. 433, 439). Nor can a treaty change the Constitution or be held valid if it be in violation of the Constitution (*The Cherokee Tobacco,* 11 Wall. 616, 620-621; *In re Beale,* 2 Fed. Supp. 899, aff'd 71 Fed. (2nd) 737.

> "No construction of a treaty, which would impair that security to private property, which the laws and usages of nations would without express stipulation have conferred, would seem to be admissible further than its positive words require." (*Strother* v. *Lucas,* 12 Pet. 410, 438, *supra.*)

> "The King cedes that only which belonged to him * * * Neither party could consider itself as attempting a wrong to individuals, condemned by the practice of the whole civilized world." (*U. S.* v. *Percheman*, 7 Pet. 51, 87.)

(4) Petitioner's construction would be contrary to the attitude heretofore taken by the petitioner to protect American claims against the Soviet Government.

If petitioner's interpretation of the Litvinoff assignment is correct, Soviet diplomacy will have succeeded in attaining a result *which it attained with no other creditor of Russia*—namely in inducing the United States to take an assignment of alleged Soviet moneys in this country and to sue for such moneys in the United States courts making the American nationals which hold the same defendants in the actions. Thereby Soviet diplomacy will have succeeded in making the United States assume the Soviet position with regard to confiscatory decrees in the United States courts. Should the United States be successful in the present litigation it will in that very process have validated through the judgments of its own courts the Soviet confiscatory decrees and will have furnished for Soviet diplomacy a defense against the $400,000,000 of American private claims which may for all practical purposes be conclusive internationally.

In order to appreciate how this result may be accomplished and how great is the danger thus threatened to American interests, it may be well first to examine the principle of sanctity of private property which the United States has heretofore maintained as a fundamental principle of international law.

Principle of Inviolability of Private Property

Both for peace-time and for war-time, the rule has been gradually established that the private property of aliens, even enemy aliens, is entitled to the protection of the laws of the state having territorial jurisdiction, and must be made the subject of compensation if taken. In the *Matter of the Delagoa Bay Railway,* Secretary Blaine instructed the American Minister at Lisbon, November 8, 1889 (2 Moore International Arbitrations, p. 1869):

> "Upon full consideration of the circumstances of the case, this Government is forced to the conclusion that the violent seizure of the Railway by the Portuguese Government was an act of confiscation which renders it the duty of the Government of the United States to assert that compensation should be made to such citizens of this country as may be involved."

Again and again in cases involving the confiscation of contractual rights the United States Government has insisted upon compensation for its citizens; examples are set forth in 6 Moore's International Law Digest, § 997. The United States regarded it as immaterial that injury to a private property right was effected by legislation of the offending country. As Secretary Bayard wrote to the American Minister at Columbia (October 13, 1886, 6 Moore's International Law Digest, § 1034):

> "It is a settled principle of international law that a sovereign cannot be permitted to set up one of his own municipal laws as a bar to a claim by a foreign sovereign for a wrong done to the latter's subject * * *"

Where the oil legislation of the Mexican Government threatened to interfere with proprietary rights of American citizens owning land in Mexico, the United States Government was emphatic in insisting upon the proprietary rights of its nationals. Secretary Hughes said in October, 1922 (American Foreign Relations, 1931, p. 143):

> "We are not insistent on the form of any particular assurance to American citizens against confiscation, but we desire in the light of the experience of recent years the substance of such protection."

Even in time of war international law recognizes the inviolability of private property from confiscation. *U. S.* v. *Percheman,* 7 Peters 51, 87 (1833). This principle has now been so generally established that, in the opinion of Hall (International Law, 1917, § 144) enemy property "may be said to enjoy a practical immunity from confiscation."

Presumably there is no intention on the part of the United States to abandon this well-established rule of the inviolability of private property, in the single case of the Soviet Union and Soviet confiscatory decrees. In the past certainly the United States has insisted upon the binding character of this principle so far as concerns the rights of American nationals against Russia.

On December 6, 1923, President Coolidge speaking of recognition said in his message to Congress:

> "Our Government does not propose, however, to enter into relations with another regime which refuses to recognize the sanctity of international obligations."

Nothing in the present policy of the Department of State, so far as we know, indicates a purpose to abandon either as to Russia or as to any other country the established principle of the inviolability of private property as the basis for the satisfaction of claims of American nationals. The only difference between the position taken by Secretary Hughes in 1924 and that taken by Secretary Hull in 1933 was that the former insisted upon compensation for American nationals as a prerequisite of recognition, while the latter was ready to extend recognition first and discuss compensation subsequently. The very terms of recognition show that a prompt settlement of claims and counterclaims was anticipated.

Destructive Effect on This Principle of Litigation Under the Litvinoff Assignment

The great success of Soviet strategy appears in that the very principle of inviolability of private property, which has hitherto constituted a barrier against the recognition of Soviet confiscatory decrees, is now being attacked by the United States itself. Its briefs on the appeal below illustrate how fully the Soviet Government is succeeding in persuading the United States to adopt its position in the American courts and to endeavor to validate here its acts of confiscation. At pages 24 and 25 of its main brief, filed in January, the United States Government told the Circuit Court of Appeals:

> "* * * The decrees of the Soviet Government acted upon its corporations in Russia to transfer all of their personal property. Validity of those decrees must be admitted."

On the score of public policy the United States Government fully adopted the Soviet position, at pages 27-8 and 29 of this brief:

> "The decrees of the Soviet Government nationalizing insurance companies are not subject to the general condemnation of confiscatory decrees of a purely political nature which fall with discrimination upon a single group of individuals. * * * The United States having recognized the Soviet Government its courts will not deny the Soviet laws their proper effect * * *.
>
> * * * * * *
>
> "Furthermore, the fact that in the present case the public order of a friendly foreign power and its diplomatic relations with the domestic sovereign are involved puts an entirely different face upon the problem and renders it quite impossible for the courts to defeat the asserted right on the grounds of public policy."

At page 31 of the same brief the United States flatly put its claim of public policy with respect to Soviet confiscatory decrees upon the basis of the Litvinoff assignment:

> "In the absence of Congressional action in the field of foreign relations, the executive branch of the Government is the proper organ of sovereignty to determine public policy. Having accepted the assignment within the scope of executive power, the executive branch has determined the public policy applicable in the present case. Consent to the operation of Soviet decrees on property in the United States of nationalized Russian corporations is granted by the acceptance of the assignment."

The petitioner went so far as to assert that the very fact of its having instituted the actions itself made the Soviet confiscatory decrees a part of American public policy (p. 30):

> "Finally, this claim is asserted by the domestic sovereign and public policy never has and cannot constitute a defense to a suit by the sovereign of the forum. Institution of the suit determines that public policy is not offended."

These arguments had not prevailed below. They were not adopted by the majority of the Circuit Court of Appeals. But the adoption of the Soviet confiscatory decrees by the United States was successful to the extent of persuading Judge MANTON, who dissented, to take the governmental view of those decrees (77 F. 2, 866). At pages 876-7 he said:

> "Is the confiscatory legislation of a recognized government, which produces effects only within its own jurisdiction, and respecting its own nationals *or foreigners*, per se, against public policy? Certainly not * * *
>
> * * * * * *
>
> "Is such legislation against public policy if it seeks extraterritorial application? * * *
>
> "* * * The known practice of the executive department of the nation pronouncing the public policy of the nation should be controlling upon the courts in such instances.
>
> * * * * * *
>
> "The act of recognition of a foreign government may import the equivalent of a definite declaration of policy which the courts would be bound to notice."

Further, at page 878, Judge MANTON said:

> "When, therefore, the Soviet Government was recognized, the courts lost all right to continue to inject their prerecognition conceptions of public policy into the international panorama in manifest derogation of the express determination of the political department and the clear juridical implications of the act of recognition. * * *
>
> "Recognition changes a policy of official disfavor into an attitude of graceful acquiescence. To impeach this legislation now in the courts as being against our public policy would clearly trench upon the sphere of the executive who has already decided the matter in a manner that concludes our courts."

While Judge MANTON puts his conclusions as a consequence of the executive act of recognition itself, it is clear that the result is in reality due to the act of the United States in urging petitioner's interpretation of Mr. Litvinoff's assignment and seeking to enforce it in the Unted States courts by arguments of public policy which constitute a full adoption of the revolutionary theory of property rights, a wholesale acceptance of the confiscatory decrees of Soviet Russia, and a negation of our established tradition of the inviolability of private property.

If that consummation is attained, it will surely mark the triumph of the diplomatic technique which gave birth to the assignment, and mark in addition the first important confirmation outside Russia of the peculiar public policy of the Soviet Union.

But in the process the United States may from the international point of view have dealt a mortal blow to the American private claims; for we cannot conceive that

any effective distinction can be drawn in diplomatic negotiation or international law between the validity and propriety of Soviet confiscatory decrees as they affect the physical and intangible property of American citizens in Russia and the validity and propriety of those same or similar decrees as they affect the property of Russian nationals located in the United States. If the Supreme Court shall at the instance of the United States Government declare it a part of American public policy as established by the acts of the political department in accepting and enforcing the Litvinoff assignment, that the latter class of confiscatory decrees shall have the force of law in the United States, we cannot conceive the possibility of the United States ever extracting from Soviet Russia an acknowledgement of liability with respect to the operation of the former class of confiscatory decrees.

No other country which has recognized Soviet Russia has allowed itself to be put by the Soviet diplomats in this position. No other country has urged in its own courts Soviet public policy as its own public policy.

In the interpretation of diplomatic as well as of other documents, the courts will consider public interests, public policy and the protection of private rights. We are confident they will not give to this assignment a construction which will vitally wound the far-reaching American policy involved in the principle of inviolability of private property in International Law.

POINT III

The Supreme Court of the State of New York having acquired jurisdiction over the funds in question, the District Court is without power to interfere with or enjoin the pertinent proceedings therein.

Let us consider how the funds in the three instant proceedings are being held:

First.—In the case of the *Bank of New York and Trust Company.* Here, the respondent is holding the funds pursuant to an order of the Court of Appeals (*Bank of New York,* R. 23). Based upon the provisions of this order, another suit has been started (*Bank of New York,* R. 12) to obtain a judicial determination for the disposal of the funds. In this suit the Supreme Court of the State of New York has appointed a referee, who has taken testimony bearing on the validity of claims against the Moscow Fire Insurance Company. He has reported to the Court and a judgment has been entered on his report providing for the payment of these funds to various claimants. Execution has been issued by some of these judgment-creditors.

Second.—In the case of the *Bank of the Manhattan Company,* the respondent is holding the funds of the Northern Insurance Company of Moscow as an assignee for the benefit of creditors, pursuant to the provisions of the New York State Debtor and Creditor Law (*Manhattan,* R. 12) and pursuant to an order of the Court appointing it as the agent of the Northern Insurance Company of

Moscow. It has advertised for claims, marshalled its assets, taken proof and filed with the Court its final account as assignee (*Manhattan,* R. 12-13). The New York Supreme Court has appointed a referee to take and state such assignee's account and hear objections. The referee has taken proof of some of the claims and has filed a report covering some of them, and is now examining the others (*Manhattan,* R. 13). His report will ultimately come before the State Court for confirmation. Following such confirmation, a final judgment will be entered in the State Court.

Third.—In the case of *Louis Pink, Superintendent of Insurance,* the funds of the First Russian Insurance Company are being held by the respondent in his official capacity, acting under order of the Court, which is wielding power granted to it by State Statute in the premises (Insurance Law of the State of New York, Section 63). In this case the Superintendent of Insurance has taken proof of claims of creditors of the First Russian Insurance Company, has filed with the Court his Fourth Report, allowing some of these claims and rejecting others, a referee has been appointed by the Supreme Court of the State of New York to pass on objections to the report and in turn report to the Court. The referee has for a period of over a year taken such testimony, his hearings are concluded and his report will soon be handed to the State Supreme Court for confirmation, and the entry of judgment for the disposition of the funds pursuant thereto.

It would be difficult to imagine three clearer cases of the assumption by the State Court of jurisdiction over the three funds in question. In each case, the respondent

has received the fund pursuant to State Court order, and officers of the State Court, to wit, referees, are passing upon validity of claims against the debtor companies.

Yet, in its brief, petitioner claims that these are merely actions *in personam* (Petitioner's brief, p. 70, *et seq.*).

Again, the petitioner is driven to contend that the instant suits in the District Court are also suits *in personam*, and cites cases such as

> *Waterman* v. *Canal-Louisiana Bank Company*, 215 U. S. 33;
> *Riehle* v. *Margolies*, 279 U. S. 218;
> *Allen* v. *United States*, 285 Fed. 679;
> *Brown* v. *Duffin*, 13 Fed. (2d) 708.

These cases have been ably distinguished in the brief submitted on behalf of respondent Bank of New York, pages 53-54. Nothing would be served by repetition here.

Suffice it to say, that in the cases cited by the petitioner, and all similar cases that we have been able to find, the proceedings in the second court were *in personam*, because the purpose of such proceeding was merely to ascertain the extent, if any, of the plaintiff's claim for the purpose of filing such claim in the proceedings in and submitting to the jurisdiction of the court which had first taken hold of the *res* and was administering it. In none of these *personam* cases cited by the petitioner was any attempt made by the plaintiff to interfere with, limit, or disturb the possession of the first court or the exercise of jurisdiction by it.

But such suits have no rememblance at all to the instant suits brought by petitioner. They are not brought to obtain a *personam* judgment which in turn will be the

basis of the filing of a claim in and submitting to the jurisdiction of the State Courts. On the contrary, the instant suits are brought to seize all of the funds in the jurisdiction of the State Courts. They deny that the State Courts have any jurisdiction of the funds, seek to nullify everything that has been done in the State Courts, and last, but by no means least, seek from the District Court an injunction to prevent those acting under State Court jurisdiction from following the directions and carrying out the provisions of State Court orders and judgments (*New York Trust Company*, R. 4). The prayer for relief prays that

> "the defendant herein, its successors, officers, agents, attorneys, employees, or assignees, and all persons or corporations acting under their direction, or in their behalf, be enjoined and restrained permanently and pending the determination of this suit from paying out or distributing to any one other than this complainant any part of the said cash, securities, and other assets or the avails thereof" (*Bank of N. Y.*, R. 4).

We challenge petitioner to cite any case in which an injunction of this nature has been granted by a second court after a first court has taken jurisdiction.

> "It is a doctrine of law too long established to require a citation of authorities, that, where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other court; and that, where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot

be arrested or taken away by proceedings in another court. These rules have their foundation, not merely in comity, but in necessity. For if one may enjoin, the other may retort by injunction, and thus the parties be without remedy; being liable to a process for contempt in one, if they dare to proceed in the other. Neither can one take property from the custody of the other by replevin or any other process, for this would produce a conflict extremely embarrassing to the administration of justice" (*Peck* v. *Jenness*, 7 How. [U. S.] 625).

The "conflict extremely embarrassing" envisioned in *Peck* v. *Jenness, supra,* has already come about, as motions have been made in the State Court against the respondent Bank of New York and Trust Company to enforce the executions of the State Court judgments, which the respondent cannot satisfy because of the restraining order in the District Court.

A similar situation arose in the case of *Matter of Bean* v. *Stoddard,* 207 App. Div. 276. In that case, N. S. Bean, as receiver of the First National Bank of Warren, Mass., applied *ex parte* to a Justice of the New York Supreme Court for leave to bring an action in the District Court of the United States against Francis R. Stoddard, Jr., as Superintendent of Insurance, who by virtue of an order of the Supreme Court was acting as liquidator of the Niagara Life Insurance Company. The petition was granted and an order made permitting such action to be brought, and requiring the Superintendent and another to submit to the jurisdiction of the United States District Court. The Appellate Division said:

"The Attorney-General moved at Special Term on behalf of said Superintendent to vacate the

order, and the motion was denied. An appeal has been taken from both orders. * * *

"It appears that the Massachusetts bank was the owner of certain bonds. These were stolen * * * Some of the bonds were offered to the Niagara Life Insurance Company * * * The petitioner claims that the insurance company never acquired any title to the stolen securities * * *

"It was shortly subsequent to this transaction that the Superintendent of Insurance, pursuant to section 63 of the Insurance Law, was put in possession of the property of the insurance company, then insolvent. The order authorizing liquidation further provided that all persons were restrained from bringing or prosecuting any suit against the insurance company or interfering with its assets, or with the Superintendent of Insurance. * * *

"We think it quite clear, even in the absence of statute but under the rule of comity, that the petitioner might not have sued in any other court without leave. Generally speaking, the funds in the hands of the Superintendent are impressed with a trust in favor of all the creditors of the corporation. A foreign court will not and should not entertain jurisdiction (Martyne *v.* American Union Fire Ins. Co., 216 N. Y. 183). When property has come into the hands of an officer or within the jurisdiction of a court, that court has the right to decide every question which occurs in the cause, and no one can take such property from its custody by any process, for this would produce a conflict extremely embarrassing to the administration of justice (Peck *v.* Jenness, 7 How. [U. S.] 612; Peale *v.* Phipps, 14 id. 368; Farmers' Loan, etc. Co. *v.* Lake St. R. R. Co., 177 U. S. 51); other courts, though of concurrent jurisdiction, are without power to render any judgment which invades or disturbs the possession of the property while it is

in the custody of the court which has seized it (Wabash Railroad *v.* Adelbert College, 208 U. S. 38); and such property is withdrawn from the jurisdiction of other courts as effectually as if the property had been entirely removed to the territory of another sovereignty (Palmer *v.* Texas, 212 U. S. 118). This rule extends and applies to strangers claiming that their property was illegally seized by an officer of the court (Freeman *v.* Howe, 24 How. [U. S.] 450). * * *

"By the provisions of section 63 of the Insurance Law, the authority of the Superintendent to take and hold the assets was by virtue of an order of the Supreme Court. * * * The Supreme Court granted an injunction on the application of the Superintendent for the purpose of permitting him to proceed with liquidation without being harassed by suits or claims of policyholders or stockholders. It had the unquestioned right to modify or vacate the injunction in the interest of justice to individuals who had claims distinct from those already stated. We see no reason, however, in this case for inviting conflict of jurisdictions by permitting the action to be brought in another court. The same result could have been reached by permitting the action to be brought in the Supreme Court, which had general jurisdiction over the liquidation proceedings. The policy of our courts is to require such procedure; and to permit a claimant to sue in another jurisdiction is a clear departure from such policy, hardly justified under the facts presented. The petitioner had and should have sought his remedy in the court having jurisdiction over the officer and the funds (Matter of Knickerbocker Life Ins. Co., 199 App. Div. 503; Krippendorf *v.* Hyde, 110 U. S. 276; Covell *v.* Heyman, 111 id. 176). * * *

"While we are convinced, for the reasons stated, that the ex parte order should not originally have

been made, we will content ourselves with modifying it by retaining that part giving leave to sue, but striking out that portion requiring the Superintendent of Insurance and the Metropolitan Life Insurance Company to submit to the jurisdiction of the District Court of the United States. We leave the question as to whether or not that court will retain jurisdiction to its discretion, under the rules of comity already referred to."

Affirmed by the Court of Appeals, 238 N. Y. 618.

There can thus be no doubt in the instant suits that the United States District Court was without jurisdiction and properly dismissed the complaints. We trust, however, that this Court will not only affirm the Circuit Court of Appeals on the question of jurisdiction, but will reaffirm what was said by the learned Judge in the District Court below on the merits of these cases. These suits are brought in defiance of and involve a reversal of everything that our courts, State and Federal, have said on the questions of confiscation and public policy in the whole history of our jurisprudence. They require a violation of the provisions of the Fifth Amendment of our Federal Constitution. They are predicated upon a total disregard of the rights of American citizens and of friendly aliens. They give no effect to the principles of *stare decisis*. To carry its point, petitioner is compelled to resort to contentions such as these:

That the Executive and not the Courts determine public policy in judicial proceedings;

That the Courts are foreclosed from construing the provisions of a treaty of recognition of a foreign government, but must accept the fiat of the Executive thereon;

That the bringing of an action by the United States predicated upon an Executive document is determinative of whether the document is opposed to our public policy and, in fact, of the meaning and effect of all the language therein contained;

That assets which have always been situate in New York, which are obligations of American municipalities and corporations and which call for performance in New York are in contemplation of law really situated in Russia;

That liquidation proceedings in the State Courts to determine the disposition of a specific *res* and in which the Court has appointed Referees, Receivers, Assignees and Depositaries for the possession of the *res*, are in reality only proceedings *in personam*.

It is submitted that suits resting on such contentions should receive at the hands of this Court a permanent and complete quietus.

CONCLUSION

The decree of the Court below affirming the decrees of the District Court dismissing the several bills of complaint should be affirmed.

Respectfully submitted,

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